IN THE

Supreme Court of The United States

OCTOBER TERM, 1919.

No. 790. 274

THE SUPREME TRIBE OF BEN-HUR,
Appellant,

v.

AURELIA CAUBLE ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF AND ARGUMENT FOR APPELLEES.

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STATEMENT OF THE CASE.

ADDITIONAL TO STATEMENT IN APPELLANT'S BRIEF.

Appellees filed their separate suits in the state courts of Indiana, alleging, among other things, that in the year 1916 appellant fraudulently and wrongfully cancelled appellees' policies and refused to accept any further payments of dues or assessments and has refused to pay any losses

on said policies, and has entirely discontinued and abandoned Class A of said appellant association.

Transcript, pages 120-122.
Transcript, pages 125-132.
Transcript, pages 133-147.

The master's report in the original bill found, among other things, that appellant was continuing Class A and intended to continue it in the future and administer its funds for the best interest of the remaining policy holders in the class.

Transcript, pages 86 and 93.

BRIEF AND ARGUMENT.

POINTS AND AUTHORITIES.

1. The injunction bill is not considered an original bill between the same parties as at law, but if different parties are introduced and different interests involved it is to that extent an original bill and the jurisdiction of the court must depend upon the citizenship of the parties.

Dunne v. Clarke, 33 U. S. 3.
Williams v. Byrne, 29 Fed. Cas. 17718.

2. The court must dismiss the case at once if it appears at any time during the progress of the case that it is without jurisdiction.

Turner v. Farmers Loan & Trust Co., 106 U. S. 555.
King Iron Bridge Co. v. Ottoe County, 120 U. S. 226.
1 U. S. Corp. Stats. 1916, Par. 1019, P. 1033.

3. If parties not before the court have rights so closely related to the issues between parties in court that a final decision can not be made between them without affecting the rights of those not before the court, the court may not dispense with such persons.

Ex Parte Equitable Trustee, 231 Fed. 571, 145 C. C. A. 457.
Shields v. Barrow, 17 How. 130, and cases cited.
Cameron v. McRoberts, 3 Wh. 571.

4. Where there is a plain and adequate remedy at law an equity suit will not lie.

Shields v. Barrow, 17 How. 130.

5. A judgment is not an absolute bar to another suit between the same parties on a different cause of action, but is an estoppel only of those questions which have been adjudicated.

Cromwell v. Sac County, 94 U. S. 351.
Southern Pacific Co. v. U. S., 168 U. S. 1.

6. An equitable defense to a civil action is now as available as a legal defense. The question now is "ought the plaintiff to recover?" and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance.

Holland v. Johnson, 51 Ind. 346.
Maxwell v. Campbell, 45 Ind. 360, 363.
Ind. Stat. 1881 Sec. 347.

7. When there are two or more plaintiffs and two or more joint defendants, each of the plaintiffs must be cap-

able of suing each of the defendants in the court of the United States in order to support the jurisdiction.

Strawbridge et al. v. Curtis et al., 3 Cranch 267.

8. Prior to Equity Rule 39 the United States Court could not render judgment in a suit unless there was diversity of citizenship as to all indispensable parties.

Shields v. Barrow, 17 How. 130, and cases cited.
Cameron v. McRoberts, 2 Wh. 571.

ARGUMENT.

There was another objection raised to appellant's ancillary bill in appellees' motion to dismiss, and the Supreme court has frequently decided that it will take cognizance of other facts in the case after it has once reached this court, if it is necessary for a fair and complete determination of the controversy.

Appellees in their motion to dismiss alleged that the original decree in the Federal Court was not a bar to the litigations in the state courts for the reason that the issues were not the same. The original decree in the Federal Court found that Class A of the Tribe of Ben Hur was to be continued and the interests of the policy holders protected and increased. The actions brought in the state courts are based on the refusal of the appellant to pay the benefits on said policies, or to continue said policies in force and effect; thus raising an issue entirely untouched by the original suit. It could not have been in the knowledge or contemplation of the Federal District Court when the decree was rendered that a year or more afterward this appellant would discontinue Class A entirely. This raises an issue that undoubtedly was not adjudicated and prosecution of such an action, even between the same parties, could not be enjoined by ancillary proceedings. In such case only those issues actually decided in the original case are barred in the subsequent litigation. An injunction applying to only part of a litigation would not prevent a multiplicity of suits and as former adjudication is a good and valid defense in the Indiana courts appellant has an

adequate remedy at law, and no case is presented for a court of equity.

Holland v. Johnson, 51 Ind. 346.
Maxwell v. Campbell, 45 Ind. 360, 363.

It is inconceivable that because parties have litigated one issue they are forever barred from suing the same parties on any issue.

Appellant in his brief has laid particular stress upon the fact that appellees could have come in and intervened in the original suit and had their rights protected, but they have lost sight of the fact that the record shows none of these appellees came in, and if they did not come in of their own accord they were not bound by the decision unless they were parties plaintiff at the very beginning.

It is a fundamental principle of class suits that every member of the class is a party to the action, either by personal appearance or by representation. If that is the case then in order for the Federal Court to have jurisdiction of a class suit on the grounds of diversity of citizenship, every member of the class appearing in person or by representation, must be of a diverse citizenship from every defendant. The rule of determining jurisdiction on the grounds of diverse citizenship as laid down by this court in the case of *Strawbridge v. Curtis*, 3 Cranch 267, is as follows:

> "Where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the Court of the United States in order to support the jurisdiction."

Measuring this case by that rule, it is plain that these appellees could not have been parties to that suit.

If George Balme, et al. could come into the Federal Court on behalf of themselves and these appellees and bind these appellees by the decree, then these appellees must have had the right to have filed a complaint in the Federal Court on behalf of themselves and George Balme, et al, and obtained the same result. Yet if these appellees had instituted that suit instead of George Balme, et al., how far would they have gone? The court would have immediately dismissed their cause for lack of jurisdiction. If appellees could not have gone into the Federal Court and asked relief against appellant, what rule of law will permit appellant to go into the same court and ask relief against appellees?

Prior to the adoption of Rule 39 in equity, the Federal Court would not have had jurisdiction of the original case of *Balme, et al. v. Supreme Tribe of Ben Hur*, but would have been forced to dismiss the same for lack of jurisdiction.

Shields v. Barrow, 17 Howard 130, and cases cited.

Equity Rule 39, however, makes an exception by permitting the court to adjudicate as between those present, without binding absent parties. Originally Rule 39 was a part of Rule 38 and only applied to class suits, but has been separated under the new rules and made to apply to "all cases."

Appellees can think of no stronger argument in this cause than that which Judge Baker delivered in his opinion in the lower court and which we hereupon quote in full:

"Baker, Circuit Judge. The original bill in this case was brought against the Supreme Tribe of Ben-Hur by George Balme and others in their own right and on behalf of other holders of Class A certificates. The court took jurisdiction on the ground of diversity of citizenship, as the defendant was an Indiana corporation, and none of the named complainants were citizens of that state. A decree in favor of the defendant resulted. Actions against the Supreme Tribe of Ben-Hur raising the same questions were then started in the state courts of Indiana by Indiana holders of Class A certificates. The Supreme Tribe of Ben-Hur thereupon presented this as an ancillary bill to restrain those Indiana citizens from prosecuting their actions in the state courts, claiming that the original bill was a class suit and the rights of all holders of Class A certificates were fully adjudicated, as in *Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916 A, 771.

It is fundamental principle of our system of jurisprudence that no court may adjudicate the rights of parties who are not subject to its jurisdiction. Had the Indiana holders of Class A certificates been named in the original bill, the court could not have taken jurisdiction on the ground then relied on, i. e., diversity of citizenship. Was there anything in the subject-matter of this as a class suit which would give the court jurisdiction over the rights of those who could not be named parties to the bill without ousting the jurisdiction?

Before the Judiciary Act of 1789 (1 Stat. 73) created the Federal courts, the doctrine of class suits (thought not called by that name) was a well-established exception to the general rule that only rights of actual parties to the bill may be affected by the decree. Story's Eq. Pl. (10th Ed.), Paragraphs 94-116: *West v. Randall*, 2 Mason 192, Fed. Cas. No.

17, 424; *Adair v. New River Co.*, 11 Ves. 429; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 349; *Mare v. Malachy*, 1 Myl. & Cr. 559; *Fenn v. Craig*, 3 Y. & Coll. 216; *Barker v. Walters*, 8 Beav. 92. At that time the courts of a state in which a particular corporation was domiciled were the necessary forums of all grievances concerning the rights of any of its citizens against that corporation. To state the same thing from a different viewpoint, the rights of a citizen against a corporation of his own state could have been adjudicated only in the courts of that state. To be sure, a citizen of a different state might have brought an action against the corporation; he might even have brought a class suit against it; but he must have brought it in the courts of the home state of the corporation.

(1) The Constitution gave to the Federal courts jurisdiction over cases of law and equity involving nonfederal questions only when the parties were of diverse citizenship. Their jurisdiction over the subject-matter of class suits, then a well-established doctrine, was thereby limited to cases wherein the parties were purely interstate. Therefore adjudication of the rights of a citizen against a corporation of his own state, being only intrastate litigation, could not be had in the Federal courts.

(2) Equity Rule 38 (198 Fed. xxix, 115 C. C. A. xxix) is as follows:

'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.'

This rule formerly was qualified by the following clause:

'But in such cases the decree shall be without prejudice to the rights and claims of the absent parties.'

It is urged by complainant that this omission was intended to remove the interstate limitation of the jurisdiction of the Federal courts when a class suit was the subject-matter. If it was intended to extend jurisdiction in such a naive fashion, such intention could not have been thus accomplished, for the limitation of the jurisdiction of the Federal courts with respect to subject-matter being constitutional, it could not be affected by rules, either affrmatively or negatively expressed.

(3) A rule more applicable to the present case is Rule 39. This rule and Act. Feb. 28, 1839, c. 36, Par. 1, 5 Stat. 321 (Comp. St. Par. 1032), on which it is based, merely formulate a long-established practice. *Commercial Bank v. Slocomb*, 14 Pet. 60, 10 L. Ed. 354; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Thomas v. Anderson*, 223 Fed. 41, 138 C. C. A. 405 (C. C. A. 8th Cir.). The rule is as follows:

'In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.'

It can not be doubted that Indiana citizens were 'out of the jurisdiction' of the Federal court in the suit against an Indiana corporation. Nor can it be doubted that 'their joinder would oust the jurisdiction of the court.' Although that did not prevent the court from proceeding with the cause, the rights of Indiana citizens were not affected, because 'in such cases the decree shall be without prejudice to the rights of the absent parties.' In other words,

although the original bill was a class suit, the class did not include Indiana citizens.

(4) Sometimes by means of an ancillary bill or an intervening petition a Federal court hears and determines a nonfederal controversy between citizens of the same state; but that occurs only in those cases in which the Federal Court is already properly in possession of a res and the determination of the intrastate nonfederal controversy is necessary to a just administration of the res. Manifestly this bill is not of that character, for the original bill involved only the charter rights of the Ben-Hur society under the Indiana statutes.

(5) The present defendants not being parties to the original bill, this proceeding is not an ancillary bill, but is an original bill of an Indiana corporation against Indiana citizens, and this court is without jurisdiction.

The bill is therefore dismissed, on the sole ground that the court is without jurisdiction to entertain it."

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Attorney for Appellees.

Respectfully submitted,